UNITED STATES
v.
CLARA B. HENRY ET AL.

IBLA 71-261 Decided April 2, 1973

Appeal from the decision of Administrative Law Judge Robert W. Mesch (Colorado Contest No. 427), by which the Clara Beth and Twin Pines placer mining claims were held null and void.

Affirmed.

Mining Claims: Determination of Validity

> Where there are indications of placer gold values which are economically marginal in terms of placer mines generally, it is appropriate to consider other aspects relating to the cost and feasibility of extraction and recovery from the particular claim(s) at issue, such as the indicated volume of placer material, mining method, the availability of water, remoteness and access, the amount of investment required and the amortization thereof, the character of the deposit, the demonstrated willingness or reluctance of knowledgeable and prudent persons to proceed with the development of a mine within the claim boundaries, the degree of success experienced in operations on adjacent claims, climatic limitations and any other relevant factors which a prudent man would be obliged to take into account before proceeding to further invest his labor and means in the reasonable anticipation that a valuable mine can be developed.

Mining Claims: Discovery: Generally -- Mining Claims: Withdrawn Land -- Withdrawals and Reservations: Effect of

> Where a mining claim occupies land that has subsequently been withdrawn, the validity of the claim must be tested by the value of the mineral deposit as of the date of the withdrawal as well as at the date of determination. If the claim was not supported by a qualifying discovery of a valuable mineral deposit at the time of withdrawal, the land embraced within its boundaries would not have been

excepted from the effect of the withdrawal, and the claim could not thereafter become valid even though the value of the deposit subsequently increased due to a change in the market value of the mineral.

APPEARANCES: James M. Pughe, Esq., Craig, Colorado for appellants Ralph W. Henry and Clara B. Henry; Richard D. Dittemore, Esq., Dittemore, Doherty and Schwartz, Littleton, Colorado, for appellants Crystal E. Arrell (nee Sisson), John A. Sisson, Stacia Sisson, and Lenora Sisson.

OPINION BY MR. STUEBING

Ralph W. and Clara B. Henry 1/, Crystal E. Arrell (nee Sisson), individually and as an heir of John A. Sisson, and John Sisson, Stacia Sisson and Lenora Sisson, as heirs of John A. Sisson, have appealed from the Administrative Law Judge's 2/ decision of March 23, 1971, in which he held that the Clara Beth and Twin Pines placer mining claims 3/ are null and void.

The contest complaint charged that the claims are invalid because no valuable mineral deposits have been discovered within their boundaries.

The Judge's conclusion was based upon his findings that the contestant had made a prima facie case in support of the charge, and that the contestees failed to carry their burden of showing by a preponderance of the evidence that mineralization has been found of such quality and quantity as would warrant a person of ordinary prudence in the further expenditure of his time and money for the development of a mine and the extraction of the minerals, the test of discovery imposed by the rule in Castle v. Womble, 19 L.D. 455 (1894), and consistently followed by this Department and the courts. The Judge found that, at best, the contestees' evidence shows only a basis for engaging in further exploration in an effort to ascertain whether the property might warrant development, and he noted that this is insufficient, citing the District and Circuit Courts'

1/ Counsel for the Henrys subsequently advised that Ralph W. Henry has died.
2/ The change of title of the hearing officer from "Hearing Examiner" to "Administrative Law Judge" was effected pursuant to order of the Civil Service Commission, 37 F.R. 16787.
3/ At the hearing the contestees asserted that their only interest was in the Twin Pines claim, which is essentially a relocation of what formerly was the Clara Beth.

decisions in Converse v. Udall, 262 F. Supp. 583 (D. Ore. 1966); 399 F.2d 616 (9th Cir. 1968).

Appellants assail the administration of the mining law by this Department, and the policy of the federal government relating to minerals economics over the past 50 years as being inconsistent with the intent of Congress when it enacted the general mining law of May 10, 1872, 17 Stat. 91; 30 U.S.C. §§ 22 et seq. We shall not discuss appellants' allegations regarding these matters except to observe that we find nothing justifiable therein.

More specifically, appellants assert that the evidence of samples taken tends to establish that a valuable deposit of placer gold has been discovered, as related by the following excerpts from appellants' statement of reasons for appeal:

> The claimant, Ralph Henry, testified that his samples taken since 1949 "would average between about 60 cents and a dollar and a quarter a yard" (Tr. 148).
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> Claimants' highly qualified expert witness, Harald W. C. Prommel, testified that "when the values go above 25 cents per cubic yard he may make some money for the two of them to have some money" (Tr. 236-7).
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> Claimants' highly qualified expert witness, Paul M. Hopkins, in his report showing 21 samples from 10 different areas showed values from $ 1.94 to 1 per cubic yard and the average of all these samples, the results of which are shown on pages 18 and 19 of his report which is part of the record, show an average value of 40.84 per cubic yard.
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> Adding the results of Mr. Meschter's two samples 1.42 and 10.07 and the sample taken by Mr. Wells, 27.50 and three additional samples taken by Mr. Hopkins, 22.00 , 17.00 and 12.00 , to the 21 original samples of Mr. Hopkins, we obtain an average of all samples of 35.13 per cubic yard.
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> The Government's expert witness, Mr. Wells, published an excellent Official Government publication, being Technical Bulletin 4, US Dept. of Interior, Bureau of Land Management, in July 1969. Pages 71 and 72 of that publication were accepted into evidence. On page 72 of that publication Mr. Wells shows a Table III,

> and if an average is taken of the cubic yard values shown in column 2 of that table, it shows an average of 28.52 per cubic yard, and below Mr. Wells states that these tests were "taken from the prospecting records of an operating company". (emphasis supplied). It must be assumed that this company was mining valid mining claims and at a profit, and that 28.52 per cubic yard meets the marketability test, and the results of these tests led the reasonably prudent mining company (and we assume its expert adviser Mr. Wells) to expend its labor and means with a reasonable prospect of success, in developing a valuable mine, thus meeting the requirements of Castle v. Womble and U.S. v. Coleman, and all other legal requirements.

The Twin Pines claim is situated about 30 miles north of Steamboat Springs, in the northern part of Routt County, Colorado, at an elevation in excess of 8,000 feet. The area is noted for its severe winters, characterized by extreme cold and deep snow. Summers are characterized by many afternoon showers and thunderstorms. The growing season is estimated at about 40 days. The working season for placer operations is reported to be from June through September. The claim is seasonably accessible by road.

Active gold mining was pursued in the area of the claim from about 1870 to 1906, with a revival of activity during the 1930's. A prior locator is reputed to have produced some gold from a portion of the claim during the 1930's. Ralph W. Henry first located a 20-acre portion of the claim as the Clara Beth in 1949. This was relocated in 1951 as an 80-acre association placer, also called the Clara Beth. This, in turn, was relocated as the Twin Pines claim. Between 1951 and 1953 Henry engaged in a sluice box operation which yielded an unspecified amount of gold. Some of this gold was sold to tourists and some was saved. Henry testified that the gold which was saved was stolen "in '64 and '65." No explanation was offered as to why the gold which was recovered in the early 1950's was not sold in the intervening 11 to 14 years. No explanation was given as to why operations which were allegedly profitable were discontinued in 1953 and never resumed, although Henry did state that his physical disability tended to hamper his efforts.

Henry testified that he had contacted a lot of people to try to interest them in the claim and a lot of them had come and checked the property, but he was never able to make a deal which would lead to immediate development. Some were interested in holding an interest in the undeveloped claim in hope that the price of gold would

increase, but none was willing to invest in development under existing economic conditions. Among these was Reynolds Aluminum, which investigated the claim in 1964.

Henry acknowledged that to purchase equipment for proper development of the claim the cost could run as high as $ 200,000. However, he asserted that he could develop a small-scale operation for "a minimum of $ 10,000."

One of the contestees' expert witnesses, Paul M. Hopkins, a consulting geologist and engineer, examined the claim, took samples and rendered a report in which he synthesized a mining operation for the claim. On his first examination he took 21 samples which ranged in value from 63.3 cents to 194.3 cents per cubic yard. On revisiting the claim he took three more samples at points which had yielded high-value samples on the previous visit. The resampling yielded indicated values of 22 cents, 17 cents and 12 cents per ton, respectively. On this occasion he was accompanied by BLM mining engineer John H. Wells, who took one sample, which assayed 27 cents per ton.

The economic success of the mining method proposed by Hopkins depended on the claimant's ability to acquire a used tractor-mounted backhoe at a cost of $750, which Henry had told Hopkins he could do. Wells testified that the current market price of that piece of equipment, used, was $ 6,000. Hopkins admitted on cross examination that if the backhoe would cost even $100 more than the estimated $750, the projected mining operation would incur a net loss, and that if it were necessary to pay $6,000, the loss would be $5,200. Further, we note that Hopkins' estimates of ore values were based on a market price for gold of $42 per ounce. This ignores the fact that the validity of the claim must be determined as of June 15, 1965, when lands were segregated from any appropriation under the public land laws by classification for disposal under the Recreation and Public Purposes Act of June 14, 1926, as amended, 43 U.S.C. §§ 869 et seq. (1970). In 1965 the value of gold was fixed by law at $35 per ounce, a fact of which we take official notice. 43 CFR 4.24(b).

Where a mining claim occupies land that has subsequently been withdrawn from mining location, the validity of the claim must be tested by the value of the mineral deposit as of the date of the withdrawal as well as at the date of determination. If the claim was not supported by a qualifying discovery of a valuable mineral deposit at the time of withdrawal, the land embraced within its boundaries would not be excepted from the effect of the withdrawal, and the claim could not thereafter become valid even though the value of the deposit subsequently increased due to a change in the

market value of the mineral. United States v. Gunsight Mining Co., 5 IBLA 62 (1972); United States v. William D. Pulliam, 1 IBLA 143 (1970); United States v. Maurice Duval, 1 IBLA 103 (1970); United States v. Ray L. Steven, A-31052 (May 13, 1970); United States v. Lester E. Martin, A-31050 (April 3, 1970).

It is apparent, therefore, that the indicated values shown by the samples taken by Hopkins are 20 percent higher than they would have been if taken in 1965 or computed at 1965 values. 4/

The operation envisaged by Hopkins involved the processing of 100 yards per day with a gross potential recovery of 50 cents per yard, for a total recovery of $9,000 based upon the processing of 18,000 yards. The cost of this operation, assuming the acquisition of a backhoe for $750, he set at $8,960.

This ignores the fact that the average of all samples shows an indicated gold value of 35 cents per yard - not 50 cents. It also ignores the need to reduce the indicated value of the samples taken by Hopkins by a factor of 20 percent in order to conform them to the gold market prevailing in 1965, which would lower the average yield substantially below 35 cents per yard. When these adjustments are applied to the plan of development proposed by appellants' expert it is apparent that a substantial economic loss would be anticipated.

Hopkins' report shows that "the potential yardage [of placer material] is about 17,000 yards," and yet he based his cost study on the processing of 18,000 yards. This difference of 1,000 yards is significant in that it is sufficient of itself to alter the cost picture from one showing a net profit to one showing a net loss. Wells testified that the potential volume of 17,000 or 18,000 cubic yards severely limits the amount of capital expenditure that could be made on the property, since there is not enough yardage to amortize the capital investment required for mechanical operations, such as a small dredging operation. A single man conducting a hand mining operation, he said, could not excavate and process more than four tons a day, which would have netted him less than a dollar per day on this property.

The testimony of Daniel Meschter, a Bureau of Land Management mining engineer, included references to heavy clay and large stone cobbles he encountered in his examination of the claim, which he said was a factor which would add to the mining cost. The field

4/ B.L.M. Mining Engineers Meschter and Wells each computed the value of the samples taken by them at $ 35 per ounce.

record made by Wells during his sampling (Contestant's Exh. 14) contains the notation "50% clay. Tough digging."

Wells testified that Henry indicated that his source of water for placer operations was Beaver Creek. However, Wells said that upon checking the claim lines and tying them to the survey corners, he found that the creek is not in fact on the claim. Wells testified that without sufficient water a placer mine is of no potential. He said that an engineer evaluating the potential of a placer property would have to take into account the water source in order to ascertain whether water would constitute an added cost. There was some mention of the fact that water tended to accumulate at the bottom of the pits, and that it might be utilized in the washing operation under certain circumstances, but the question of the source and sufficiency of available water was not answered. Henry testified that there is a heavy spring run-off of water which comes down through the claim, and also that underground water is very close to the surface. When asked if this would create a problem in mining, he replied, "Not on a big mining operation, it will not. In fact, it helps and that's what I want in there is a big mining operation." However, as we have seen, from what is known of the volume and value of the placer material, a big mining operation would have been even more unwarranted than a small one.

Finally, as noted by Judge Mesch in his decision, Hopkins testified that he did not think sufficient exploration of this claim has been done to justify attempting to exploit the deposit. Henry also testified that further testing would be required to determine the depth and quantity of placer material before a heavy investment was committed to a mining operation. He stated that he was "still in exploratory stages."

Our conclusion that the Twin Pines Placer Claim was not supported by a qualifying discovery of a valuable mineral deposit as of June 15, 1965, is based upon our analysis of all of the factors which a man of ordinary prudence would be obliged to consider before investing his labor and means in an attempt to develop a valuable mine on this claim, as revealed by the evidence adduced at the hearing.

At the time of the hearing the gold content of the placer material found on the claim was, at best, economically marginal in terms of placer mines generally. On the basis of the value of gold in 1965, when the land was segregated from location, all the evidence tends to establish that it would have been uneconomical to develop a mine on the claim and any attempt to do so would have been imprudent. The values were too low, the amount of capital investment required for a

mechanized operation could not be justified, the volume is so limited that developers could not reasonably anticipate that the investment could be amortized, much less yield a profit. Water sources and amounts are in doubt. The climatic limitations of the area would certainly cause work interruptions. Heavy clay and stone cobbles are prevalent. Hand mining would yield such a meager return that no prudent person would seriously undertake it. This estimation of the potential of the claim was apparently shared by Henry, who discontinued his own efforts to mine the claim, and by those investors whom he contacted in an effort to obtain capital for development.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Edward W. Stuebing, Member

We concur:

Joseph W. Goss, Member

Anne Poindexter Lewis, Member.